A

HUP SOON OMNIBUS CO SDN BHD & ANOR v. LIM CHEE

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
ASMABI MOHAMAD JCA
B [CIVIL APPEAL NO: A-02(NCVC)(W)-1677-11-2015]
7 DECEMBER 2017

CIVIL PROCEDURE: *Costs – Security for costs – Preliminary objection – Failure*
C *to comply with court order for security for costs – Whether non-compliance was a blatant disregard – Whether appeal ought to be struck out for failure to comply with court order for security for costs*

At a directors meeting held on 22 March 2011, there was a proposal for a Management Agreement ('MA') being entered into to manage the first
D appellant. The Board of Directors agreed that the first appellant was to be managed by the respondent under the MA. After the passing of a resolution and the signing of the MA, the respondent immediately took over the management of running of the business of the first appellant. Subsequently, certain members and directors, including the second appellant, *inter alia*,
E continued to call for an extraordinary general meeting ('EGM') to terminate the MA. The respondent, on the other hand, filed a proceeding in the High Court for an injunction to stop the proposed EGM. The appellants counterclaimed asking the appellants be allowed to hold the EGM in accordance with Article of Association and the Companies Act 1965. The court granted the injunction and dismissed the appellants' counterclaim with
F costs. Dissatisfied with the decision, the appellants filed this present appeal. When this appeal was called for hearing, the respondent raised a preliminary objection stating that this appeal was incompetent as the appellants had failed to comply with an order of the Court of Appeal dated 31 March 2016 obtained by the respondent ordering the appellants to pay RM50,000 as
G security for costs of the appeal.

Held (striking out appeal from cause list)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) The appellants had wilfully breached the 31 March 2016 order requiring
H them to deposit RM50,000 within 14 days as security for the costs. The appellants had offered no plausible explanation for the breach of the order. The non-compliance was a blatant disregard of the order of the Court of Appeal for which sanctions would be justified. The court will pay particular regard to the paramount importance of securing
I compliance with its orders. (paras 6-8)

(2) A court order is not a mere technical rule of procedure that can be simply ignored. It must be obeyed as ordered unless set aside or varied. If court orders were allowed to be ignored with impunity, this would

destroy the authority of judicial orders which is the heart of all judicial systems. Court orders must be respected and complied with. (paras 12 & 13)

***Bahasa Malaysia** Headnotes*

Pada mesyuarat pengarah yang diadakan pada 22 Mac 2011, terdapat cadangan bagi Perjanjian Pengurusan ('MA') dimeterai bagi pengurusan perayu pertama. Lembaga Pengarah bersetuju bahawa perayu pertama akan diuruskan oleh responden di bawah MA. Selepas resolusi diluluskan dan MA ditandatangani, responden telah mengambil alih urusan menjalankan perniagaan perayu pertama. Seterusnya, beberapa ahli dan pengarah, termasuk perayu kedua, antara lain, meneruskan untuk memanggil satu mesyuarat agung luar biasa ('EGM') untuk menamatkan MA. Responden, sebaliknya, memfailkan prosiding di Mahkamah Tinggi bagi mendapatkan satu injunksi untuk menghentikan EGM yang dicadangkan. Perayu menuntut balas agar perayu dibenarkan menjalankan EGM mengikut Artikel Persatuan dan Akta Syarikat 1965. Mahkamah membenarkan injunksi dan menolak tuntutan balas perayu dengan kos. Tidak berpuas hati dengan keputusan itu, perayu memfailkan rayuan ini. Apabila rayuan ini dipanggil untuk pendengaran, responden menimbulkan bantahan awal dengan menyatakan bahawa rayuan ini tidak kompeten kerana perayu gagal mematuhi perintah Mahkamah Rayuan bertarikh 31 Mac 2016 yang diperoleh oleh responden yang mengarahkan perayu membayar RM50,000 sebagai jaminan kos rayuan ini.

Diputuskan (membatalkan rayuan daripada senarai kausa tanpa perintah untuk kos)

Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Perayu dengan sengaja memungkiri perintah 31 Mac 2016 yang memerlukan mereka mendeposit RM50,000 dalam masa 14 hari sebagai jaminan untuk kos. Perayu tidak memberikan penjelasan yang munasabah untuk kemungkiran perintah tersebut. Ketidakpatuhan tersebut adalah ketidakpatuhan yang terang-terangan terhadap perintah Mahkamah Rayuan di mana hukuman akan dijustifikasikan. Mahkamah akan memberi perhatian khusus pada kepentingan dalam memastikan pematuhan terhadap perintahnya.

(2) Perintah mahkamah bukanlah prosedur tatacara teknikal semata-mata yang boleh diabaikan. Ia mesti dipatuhi seperti yang diperintahkan kecuali diketepikan atau diubah. Jika perintah mahkamah dibenarkan untuk diabaikan dengan tidak sah, ini akan memusnahkan kuasa perintah kehakiman yang merupakan asas semua sistem kehakiman. Perintah mahkamah mesti dihormati dan dipatuhi.

A **Case(s) referred to:**
Stolzenberg and Others v. CIBC Mellon Trust Co Ltd [2004] EWCA Civ 827 ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 14A

B *For the appellants - Kerpal Singh; M/s Jagjit, Kerpal & Sakti*
For the respondent - Choy Kam Lee; M/s KL Choy

[Editor's note: For the High Court judgment, please see Lim Chee lwn. Hup Soon Omnibus Co Sdn Bhd & Satu Lagi [2016] 1 LNS 115 (appeal struck out).]

Reported by Sandra Gabriel

C

JUDGMENT

Mohd Zawawi Salleh JCA:

The Antecedents

D **[1]** This is an appeal against the decision dated 17 August 2015 of the High Court at Ipoh (Samsudin bin Hassan J, presiding) granting the respondent's application for an injunction to hold an EGM to terminate the Management Agreement ("MA") to manage the business of Hup Soon Omnibus Co Sdn Bhd (898-A) ("first appellant") and dismissing the E appellants' counterclaim with costs of RM5,000.

[2] When this appeal was called for hearing before us on 17 August 2016, learned counsel for the respondent raised a preliminary objection stating that this appeal was incompetent as the appellants had failed to comply with the F order of the Court of Appeal dated 31 March 2016 which ordered the appellants to pay RM50,000 security for costs of the appeal.

[3] We upheld the preliminary objection and accordingly ordered that the appeal be struck out from the cause list.

[4] We now give our reasons for doing so.

G

Facts Of The Case

[5] The history of this litigation and the material facts of the case are fully set out in the written submissions filed by the parties and may be summarised as follows:

H (a) The first appellant is a company operating a bus service between Kampar, Bidor, Tapah, Teluk Intan and its surrounding small towns in Perak.

(b) The second appellant is a shareholder and director of the first appellant. The respondent is also a shareholder of the first appellant. I

(c) At the directors meeting held on 22 March 2011, there was a proposal for an MA being entered into to manage the first appellant. The board of directors agreed that the first appellant was to be managed by a

manager (the respondent) under MA. The resolution was passed and the MA was signed. The respondent immediately took over the management of running of the business of the first appellant.

(d) Then, certain members and directors, including the second appellant, tried to move a resolution to terminate the MA claiming that it was invalid and wrongly entered into and that it was bad for the company.

(e) The respondent took out a writ of summons *vide* Ipoh High Court Guaman Civil 22 NCVC-142-2011. After a full hearing, the court on 10 July 2013 declared that the MA was valid.

(f) On 23 August 2013, the second appellant together with other directors and some shareholders issued an open letter to the secretary of the first appellant requesting for the board of directors to call for an EGM. Various allegations were made against the respondent to form a basis to terminate the MA.

(g) On 30 August 2013, the respondent wrote a reply answering and denying all the allegations levelled against him.

(h) The appellants did not recall their notice to requisition the EGM and continued to call for an EGM to terminate the MA.

(i) The respondent filed proceedings in the Ipoh High Court *vide* Guaman Sivil No: 22NCVC-146-09-2013 for an injunction to stop the proposed EGM. The appellants counterclaimed asking the appellants be allowed to hold the EGM in accordance with Article of Association and the Companies Act 1965. The court granted the injunction and dismissed the appellants' counterclaim with costs.

(j) The second appellant, being a member of the board of directors, and in order to frustrate the manager in the management of the first appellant, issued various letters to various banks to freeze the account of the first appellant and also instructed the secretary to call another EGM to be held on 7 November 2014 to terminate the MA again.

(k) The respondent then filed proceedings for an injunction and obtained an interim injunction order. The injunction was to be heard *inter partes*.

(l) The respondent also filed an application under O. 14A of the Rules of Court 2012, applied to have the matter decided.

(m) As alluded to earlier in this judgment, the court granted the respondent's application for an injunction and dismissed the appellants' counterclaim.

(n) Dissatisfied with the impugned decision, the appellants appealed to this court.

(o) Meanwhile, on 31 March 2016, the Court of Appeal granted the respondent's application for security for costs in the sum of RM50,000, to be paid within 14 days of the service of the sealed order.

A (p) The sealed order was served on 14 June 2016 and the last day for payment of the security for costs was 28 June 2016 but up to the date fixed for hearing of the appeal, it has not been paid as ordered by the Court of Appeal.

Reasons For Decision

B

[6] On the factual matrix of the present case, it is quite plain to us that the appellants had wilfully breached 31 March 2016 order requiring them to deposit RM50,000 within 14 days as security for the costs.

[7] The appellants had offered no plausible explanation for the breach of C the order. In our view, the non-compliance was a wilful and blatant disregard of the order of the Court of Appeal for which sanctions would be justified.

[8] The court will pay particular regard to the paramount importance of securing compliance with its orders. In *Stolzenberg and Others v. CIBC Mellon Trust Co Ltd* [2004] EWCA Civ 827, Arden L J said at para; 167:

D

> … Compliance with orders of the court is not a question of judicial *amour propre*. It goes to the essence of the rule of law that parties subject to the court's jurisdiction … should comply with the court's orders. The gravity of the matter of non-compliance is plainly increased where the non-compliance results from a conscious decision, as in this case. It E follows, as Ward LJ said in *Hytec Limited v. Coventry City Council* [1997] 1WLR 1666 at 1674 to 1675, that, 'If a party intentionally or deliberately … flouts the order, he can expect no mercy'. He has to persuade the court that in all the circumstances the injustice to him outweighs the interests of the administration of justice and the injury to the other party.

F **[9]** In this regard, it is pertinent to note that respondent had given three signed cheques to the first appellant's director for the payment of the amount of security of costs, but to date, it has not been paid as ordered by the Court of Appeal. This clearly demonstrates that the appellants' breach has been conscious and deliberate. The appellants did not seek leave of the court for extension of time for the furnishing of security for costs.

G

[10] Undaunted, learned counsel for the appellants now argues that an order of striking out is unjustified in the present case because 31 March 2016 order is not an "unless order". With respect, we disagree. In the case of *Stolzenberg and Others v. CIBC Mellon Trust Co Ltd* (*supra*) there was an appeal H against the refusal by a judge to grant the defendants relief from an order which debarred them from defending the action unless they complied with various orders including one relating to discovery, which they had previously disobeyed. Arden LJ in her judgment referred to a number of cases in support of the following propositions:

I (i) That non-compliance with an unless order particularly if intentional, was a factor to be taken into account in determining whether a judge should make an order striking out a party's case; and

(ii) The fact that the party in default could show that a fair trial still possible notwithstanding his default, did not necessarily mean that a strike out order should not be made.

[11] In connection with the first proposition, Arden L J said (at para. 167):

> The fact that an unless order has been made inevitably means there is an additional factor to consider ... **It is only a factor to be weighed in the balance** … .
>
> (emphasis added)

[12] Before parting with this appeal, we would like to emphasise that a court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored. If we allowed court orders to be ignored with impunity, this would destroy the authority of judicial orders which is the heart of all judicial systems. We hold a firm view that a court order is not a mere technical rule of procedure that can be simply ignored. In our jurisprudence, court orders must be respected and complied with. Those who choose to ignore them do so at their own peril.

[13] For the foregoing reasons, we struck out the appellants' appeal from the cause list and made no order as to costs.